National Environmental Policy Act and other "process violations").[2]

The court of appeals' decision parallels the Eleventh Circuit's decision in *Region 8 Forest Service Timber Purchasers Council* v. *Alcock*, 993 F.2d 800 (1993), cert. denied, 510 U.S. 1040 (1994), in which that court held that timber companies lacked standing to challenge a policy that would allegedly reduce the amount of timber available for future contracts. The Eleventh Circuit reasoned that "no right is conferred on the Timber Companies to harvest a set amount of timber each year," and "Timber Companies have no right to compel the Forest Service to sell any future timber to them." *Id.* at 808.

Petitioner's reliance (Pet. 9) on the Eighth Circuit's decision more than two decades ago in *Arkla Exploration Co.* v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (1984), cert. denied, 469 U.S. 1158 (1985), to demonstrate a circuit conflict warranting this Court's review is misplaced. In that case, the court found that the oil company was injured when

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[2] The decision that petitioner lacks standing was also correct because petitioner did not suffer any legally cognizable injury arising from the Forest Service's decision not to go forward with the Horse Creek timber sale. Petitioner has no "legally protected interest," *Lujan*, 504 U.S. at 560, in having National Forest land opened up for timber sales. The decision to put the timber contracting process on hold thus did not infringe any legal protected interest of petitioner's. In addition, the nexus between the Forest Service's wholly discretionary decision to open National Forest land for timber harvesting, its consultation process, and the ultimate award of a hypothesized timber harvesting contract to petitioner is too remote to support Article III standing. See *ibid.* Indeed, it is hard to understand how, in this Administrative Procedure Act suit, non-final agency action (withdrawing a proposed timber sale for further study) can give rise to a cognizable injury-in-fact. See Pet. App. 51 n.15 (holding that withdrawal of the timber sale was not final agency action).

it was excluded from a bidding process that actually occurred. *Id.* at 353-354. In *Arkla*, unlike the present case, a court order could redress the injury by requiring that the government conduct a lawful bidding process. Here, there has been no sale, nor is any sale scheduled. There thus is no bidding process to correct.[*]

Petitioner's argument (Pet. 8-9) that the court's decision conflicts with rulings of this Court is equally flawed. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 211 (1995) (cited at Pet. 8), the Court held that a "discriminatory [bidding] classification [which] prevent[s] the plaintiff from competing on an equal footing" for Government contracts constituted an injury-in-fact. That is of no help to petitioner, who does not allege any disparity in the treatment of bidders.

*Watt* v. *Energy Action Education Foundation*, 454 U.S. 151 (1981) (cited at Pet. 8), is even further afield. There, California had standing because a bidding system adopted by the Secretary of the Interior allegedly precluded California from receiving an adequate return on its statutory right to a share of lease royalties. The flawed bidding sys-

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[*] In *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228 (1996), the District of Columbia Circuit held that a lumber company had standing to challenge, on a variety of statutory grounds, final agency action adopting a particular logging plan because the logging cutbacks it permitted would "clearly inflict injury on the firm's economic well-being, which an order reducing the cutbacks would redress." *Id.* at 1233. Petitioner, by contrast, has failed to demonstrate that similarly concrete and immediate economic harms have befallen it or that its economic interests would *likely* be advanced by a court order invalidating the Preservation Plan. In any event, that aspect of the court of appeals' opinion was not necessary to its decision because it found standing on alternative grounds. *Id.* at 1232 ("We find that the plaintiffs have set forth facts showing those [standing] elements in two independent ways.").

tem thus had a concrete and identifiable financial impact on the State that a court could redress. *Id.* at 160-161. Petitioner has no statutory right to a timber contract and no concrete or identifiable financial injury arising from the government's failure to go forward with a competitive bidding process. See also *Bryant* v. *Yellen*, 447 U.S. 352, 367-368 (1980) (cited at Pet. 8) (standing existed because it was "highly improbable" that application of federal law would not directly reduce the price of land that the plaintiffs wished to purchase, and judicial relief would make it "likely" that below-market priced land would become available).

b. The court of appeals also correctly ruled that petitioner's "direct contact" (Pet. 9) with the Preservation Plan did not amount to a cognizable injury. The "psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982). Framing the complaint in terms of unwanted "exposure" to a governmental policy does not change the analysis.

Petitioner's contention (Pet. 9-11) that the court of appeals' decision conflicts with the rulings of other courts is incorrect. First, almost all of the court of appeals' standing cases cited by petitioner (see Pet. 10) predate this Court's decision clarifying the test for Article III standing in *Lujan*.

Second, the decision below, in fact, does not conflict with the decision of any other court of appeals. All of the court of appeals cases cited by petitioner involved governmental displays of sectarian religious symbols on government property. See *Suhre* v. *Haywood County*, 131 F.3d 1083

(4th Cir. 1997) (courtroom display of the Ten Commandments); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (inclusion of image of Mormon temple in city logo), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (city seal containing the word "Christianity"); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (chapel in airport), cert. denied, 475 U.S. 1047 (1986); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (large lighted cross in state park); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.) (courthouse display of the Ten Commandments), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (creche in federal park).

This case does not involve the display of any religious item or symbol on government property. The Medicine Wheel itself is not a governmental display of a religious symbol on property; it is property in its natural state, and the state in which it has been since time immemorial. The Preservation Plan likewise is not a public display of a religious symbol, and it does not require petitioner to undertake exceptional efforts or to forgo governmental services to avoid exposure to it. Indeed, the gist of petitioner's complaint is that it desires closer contact with the Medicine Wheel area, not that the government has erected a display or exposed it to religious symbols or rituals that it wishes to avoid. Compare *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1201-1203 (1996) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) (discussing conflict in the circuits on Article III standing to challenge "expos[ure] to a state symbol that offends his beliefs"). Beyond that, the Court could not resolve the standing issue that petitioner frames without first addressing whether a for-profit timber company, which is suing in its own right

and not in any representative capacity, can suffer the type of psychic offense that might give rise to Article III standing to challenge a religious display.

The issue presented in this case is distinct and much narrower than that presented in the cases petitioner cites. The issue is whether witnessing governmental displays of respect in its land-management policies for the religious and cultural beliefs of Indian Tribes to which the federal government has a unique trust responsibility, see *Morton* v. *Mancari*, 417 U.S. 535 (1974), invades a cognizable, legally protected interest. Not one of the decisions from the other courts of appeals cited by petitioner presented, raised, or decided that question. There thus is no conflict in the circuits warranting this Court's review. Indeed, the petition echoes the arguments advanced in the petitions for a writ of certiorari in *DeWaal* v. *Alston*, 125 S. Ct. 1294 (2005), and *Bear Lodge Multiple Use Association* v. *Babbitt*, 529 U.S. 1037 (2000), in which this Court denied review.

2. Petitioner's Establishment Clause challenge (Pet. 14-18) to the Preservation Plan does not merit this Court's review. Neither the district court not the court of appeals addressed the Establishment Clause question, so it is not properly positioned for this Court's review. See *Cutter* v. *Wilkinson*, No. 03-9877 (May 31, 2005), slip op. 8 n.7. Furthermore, no other court of appeals has addressed whether such plans violate the Establishment Clause. There thus is no conflict in the circuits that necessitates this Court's review at this time.

The Preservation Plan, moreover, fully comports with this Court's precedent. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court upheld against an Establishment Clause challenge a program of releasing students early from public elementary school classes so that they could attend inde-

pendently sponsored religion classes. In so holding, the Court explained that government "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. The Establishment Clause does not require government to operate its programs with "callous indifference to religious groups," for "[t]hat would be preferring those who believe in no religion over those who do believe." *Ibid.*

Moreover, the government's longstanding trust responsibility for Native American Tribes makes this type of measured and calibrated accommodation of the cultural and religious interests of Tribes on land that historically belonged to them particularly appropriate. In *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 454 (1988), the Court acknowledged that the government has discretion to accommodate religious practices and noted approvingly that the government in that case "ha[d] taken numerous steps * * * to minimize the impact that construction of the * * * road [on federal land] will have on the Indians' religious activities." *Ibid.* In words that speak directly to the constitutionality of the Preservation Plan at issue here, the Court affirmed that "[t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2005